

**To: Federal Relations, Energy, and Telecommunications Committee**

**From: Mona Jamison, Lobbyist for Diamond Cross Ranch**

EXHIBIT 1  
DATE 2-16-09  
HB 422

**PLEASE SUPPORT HB 422 - Eminent domain- KEY POINTS**

- Private property rights are a core value in Montana that must be protected from private corporations and government that seek to overstep their bounds by seizing private land;
- Current law in Montana allows private corporations, such as railroad developers, to seize private property through the eminent domain process in which a landowner is forced to sell their land even if they don't want to;
- What many Montanans may not know is how low the threshold is for a railroad developer to take this drastic step: existing Montana eminent domain laws give the benefit of the doubt to the developer as it does not have to prove that the public will truly see an advantage from their proposed railroad development. While there are cases in which eminent domain is appropriate, it should be used as a last resort and it should be the developer's burden to prove that the public will truly benefit from the project;
- Currently, the private company that is seeking to develop the Tongue River Railroad in Eastern Montana does not meet an appropriate standard for public use- it lacks economic logic and causes excessive intrusion on private land when compared to alternatives.
- Unfortunately, because our state's eminent domain laws provide insufficient protections for landowners, the private interests behind the TRR may be able to force dozens of unwilling ranchers and property-owners to sell their land against their wishes;
- It does not have to be this way. Other states across the U.S as diverse as South Dakota, Arizona and New Jersey are waking up to the threats posed by these problems and have moved to shore up private property rights. Montana should do the same;
- In response to this growing concern among Montana citizens, the State Legislature is considering a new law that would require railroads seeking to exercise eminent domain to demonstrate that their proposed project truly meets the test of delivering a public benefit;
- To be sure, this plan would not prevent railroads from being constructed in our state if and when they are necessary and will promote the public interest – but the new law will make the process much more transparent and it will ensure that private property owner's rights are not trampled by corporate interests. Under this law, the benefit of the doubt would go to the Montana landowner and it would be up to the railroad to show that they are exercising eminent domain as a last resort and for a reason that promotes the public good.
- Montanans must get involved in this debate, talk to elected officials, and stand up for private property rights so that a proposed railroad project must be proven to provide a public use and is a public necessity *before* private property can be taken from Montana residents.

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**Q: How does eminent domain pertain to railroad development and who can exercise eminent domain?**

**A:** Eminent domain is a process through which an entity can seize private property from an owner who does not necessarily wish to sell their land and without their consent. Currently, railroad developers are able to seize private land in order to move forward with their projects. Governments or corporations such as railroad developers looking to pursue development on land which is owned by private landowners can exercise eminent domain.

**Q: Do landowners have any rights to protect themselves against railroad developers looking to exercise eminent domain?**

**A:** Landowner rights vary by state but in Montana eminent domain laws do not give sufficient protections for landowners, as railroad developers do not have to prove that the public will truly see an advantage from their proposed project. In eastern Montana for example, the owners of the land over which the Tongue River Railroad must pass have few defenses under current law. Other states around the nation like Arizona, South Dakota and New Jersey have already changed their laws to give greater rights and protections to their citizens and Montana should do the same.

**Q: What is being proposed to fix this situation and to protect the landowners affected by the eminent domain and railroad development? What are you asking Montanans to do?**

**A:** This bill proposes a new law that would strengthen private property rights against the threat of railroad developers using eminent domain to enrich themselves at the expense of landowners. Under this new law, railroad developers would have to go through a more rigorous and transparent process to demonstrate that their request to exercise eminent domain is truly necessary and will create a public benefit. Montanans can stand up for private property rights by getting involved in this debate and talking to elected officials so that a proposed project must be proven to provide a public use and is a public necessity *before* private property can be taken from landowners in Montana.

**Q: Aren't there cases where eminent domain can actually help the residents of Montana?**

**A:** Yes. There have been and will continue to be cases in which eminent domain is appropriate, including for railroad construction. However, it should be used as a last resort and it should be the developer's burden to prove that the public will truly benefit from the project. The proposed change to the law will ensure that property rights are protected and private railroad companies are required to go through a rigorous and transparent process to prove that their plans will benefit the public.

**Q: Isn't the Tongue River Railroad good for the public? Don't we need new development such as railroads?**

**A:** Contrary to what the TRR developers might posit, the proposed railroad in Eastern Montana must meet an appropriate standard for public use. The TRR has not demonstrated that there is a economic need for them, creating a lapse in economic logic. Further, the designated path causes excessive intrusion on private land when compared to other potential alternatives.

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**RE: HB 422 - EMINENT DOMAIN**

**Federal Authority vs. State's rights**

**FACT:** While the federal government does have the right to regulate railroad carries and to provide approvals for new railroad construction, even if the tracks are located entirely in one state, it does not have the right to preempt state eminent domain laws.

**FACT:** The Surface Transportation Board, the federal agency governing railroads, specifically acknowledges that: 1) eminent domain proceedings are regulated by state law and not administered by the Board and 2) that applicants are responsible for the acquisition of land necessary for execution of the proposed project.<sup>i</sup>

**FACT:** Unlike federally approved utilities or pipeline projects approved by the Federal Energy Regulatory Commission (FERC), Surface Transportation Board (STB) Decisions approving rail construction does not provide a rail carrier with a certificate of public convenience and necessity carrying a federally-backed right to use the right of eminent domain.<sup>ii</sup>

**FACT:** Furthermore, relaxed standards for approval of railroad construction no longer require the STB to even address the question of whether or not a railroad is in the public interest. The STB must merely determine that the construction is "not inconsistent" with the public convenience and necessity before approving railroad construction.<sup>iii</sup>

**FACT:** Recently, as a display of this state control, many states have amended their eminent domain laws to provide additional protections to the state and to landowners. At least three states, South Dakota, New Jersey, and Arizona, have used these reforms specifically to safeguard interests specifically against private railroad corporations.<sup>iv</sup>

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<sup>i</sup> See, e.g., Dakota, Minnesota & Eastern RR Corp. v. South Dakota, (S.D. 2002).

<sup>ii</sup> FERC, as part of its approval process, issues the utility in question a certificate of public convenience and necessity. A FERC certificate holder has the federally-backed right to use the right of eminent domain, which is exercised via federal court and federal law, not via state law eminent domain proceedings initiated in a state court.

<sup>iii</sup> Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. § 10901.

<sup>iv</sup> See SDCL 49-16A-75 *et seq.*; New Jersey P.L. 2007, c290 (Bills S-2743 and A-4625) amending P.L. 1962, c.198, N.J.S.A. 48:12-35-1, passed Jan. 13, 2008; and Arizona House Bill 2156, amending Title 28, A.R.S. by Adding Chapter 29, Relating to Railroad Project Review, signed into law on June 27, 2008.

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# Montana Farmers and Ranchers Equity Act

Survey on Private Property Rights  
and Eminent Domain Law

# Montana Farmers and Ranchers Equity Act

## Survey

*How do Montanans feel about private property rights and eminent domain? Are their rights protected? Can more be done to safeguard the value of private property?*

- Field dates: October 1 – 3, 2008
- Interviews among 706 registered voters statewide, including an oversample among 202 voters who live in southeast Montana
- Margin of error =  $\pm 3.7$  percentage points overall, higher among subgroups

# Montana Farmers and Ranchers Equity Act

## Protecting Property Rights Is A Major Priority

*When survey respondents were asked: With which statement do you agree more?*

Private property rights are a core value that Montanans hold dear. It is critical to protect individuals from private corporations overstepping their bounds by seizing private land, which violates private property rights.



**67%**

America is facing more economic and energy insecurity than we have in decades. The law should support requiring property owners to sell their land to private corporations in the rare occasions when it is truly necessary.

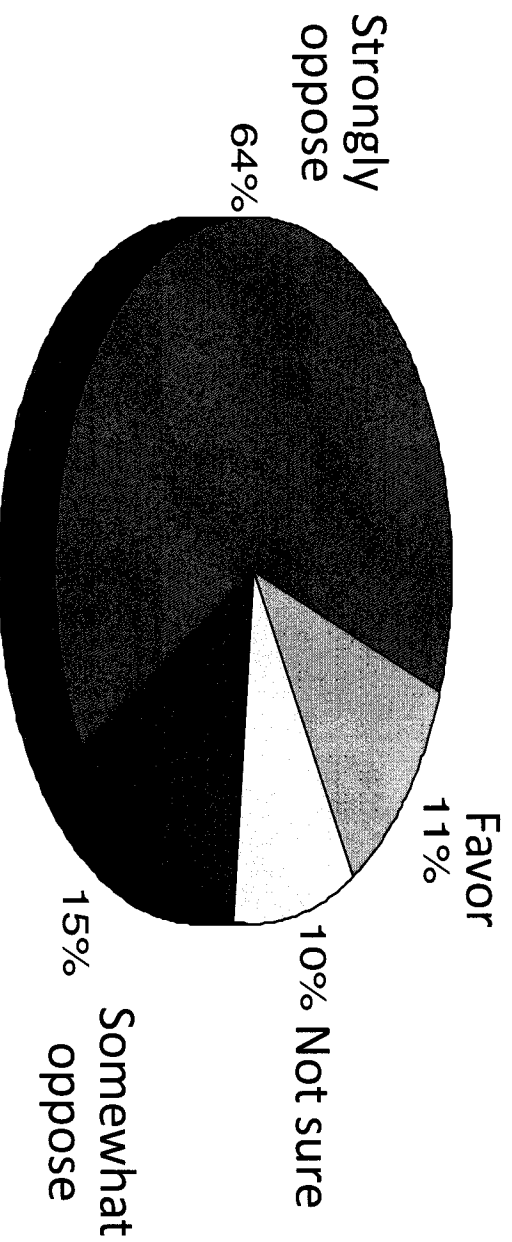


**21%**

# Montana Farmers and Ranchers Equity Act

## Negative Reaction to Current Eminent Domain Law

*"Current laws allows private corporations to force private property owners to sell their land using a process called eminent domain. The landowner is paid for the land, but does not have a choice about whether or not to sell it."*



# Montana Farmers and Ranchers Equity Act

## Strong Support for Changing Current Eminent Domain Law

*"This proposed new law would require entities that want to acquire private property using eminent domain to obtain approval from the state. They also would have to show that the transfer of the land is truly necessary and that there is not any other land they could use for the same purpose. This change would make it harder for private corporations to force private landowners to sell their land if they do not want to."*

